No. 83-5567

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT BRIAN WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JAMES C. McKAY*
JOHN H. MORE
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys For Petitioner

Of Counsel:

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044

*Attorney of Record

July, 1983

QUESTIONS PRESENTED

1. Whether petitioner's pre-trial statements to police officers were obtained in violation of his right to counsel under the Fifth and Fourteenth Amendments to the United States Constitution, after petitioner had requested counsel and particularly after counsel had been appointed?

2. Whether petitioner's pre-trial statements made after counsel had been appointed to police officers who knowingly failed to advise petitioner's attorney that they were interrogating petitioner?

3. Whether petitioner's pre-trial statements to police officers and tangible evidence taken from petitioner's automobile were obtained in violation of his rights under the Fourth and Fourteenth Amendments to the U.S. Constitution, when they were the result of an illegal arrest or detention by the police without probable cause?

4. Whether tangible evidence taken from petitioner's automobile pursuant to a search warrant were obtained by police officers a result of an illegal seizure of the car without probable cause prior to the issuance of the search warrant, thereby violating petitioner's rights under the Fourth and Fourteenth Amendments to the U.S. Constitution?

TABLE OF CONTENTS

Page

APPENDICES

TABLE OF AUTHORITIES

Page

B. Constitutional and Statutory Authorities

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT BRIAN WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner Robert Brian Waterhouse prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of Florida in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida affirming petitioner's conviction of first degree murder and sentence of death, which is reported in Waterhouse v. State, 429 So.2d 301 (Fla. 1983), appears at Appendix A, pp. 1a-11a. The trial court's orders denying petitioner's motions to suppress evidence, its judgment, and its sentencing determination and finding of facts on sentencing are unreported and appear at Appendix B, pp. 1b-6b.

JURISDICTION

The Supreme Court of Florida issued its opinion and judgment in this case on February 17, 1983. (App. A, p. 1a.) On April 27, 1983, the Supreme Court of Florida by written order denied petitioner's timely motion for rehearing and affirmed the conviction and penalty, which appear at Appendix C. Petitioner filed a timely application on June 16, 1983, for an extension of time in which to file a petition for writ of certiorari, and Justice Powell on June 17, 1983, ordered that the time for filing this petition be extended to and including July 26, 1983. Robert B. Waterhouse v. Florida, No. A-1008 (June 17, 1983).

The jurisdiction of the Court rests upon 28 U.S.C. § 1257(3), the petitioner having asserted below, and is asserting here, a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated . . ."

the Fifth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . ."

and the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty or property without due process of law . . ."

STATEMENT OF THE CASE

1. Introduction.

On January 3, 1980, the nude body of a woman was discovered on the shore of Tampa Bay in St. Petersburg, Florida. On January 31, 1980, the Pinellas County Grand Jury met and returned an indictment charging petitioner with the premeditated murder of one Deborah Kammerer by drowning after having beaten and choked her. (R.16, 17.)[1/]

Prior to trial counsel for the petitioner made a variety of challenges to the constitutionality and constitutional applicability of the Florida capital punishment laws but each of these arguments was rejected by the trial court judge. Counsel for petitioner also moved to suppress certain items of tangible evidence recovered from petitioner's automobile on or after January 7, 1980, as well as a series of statements made by petitioner to officers of the St. Petersburg Police Department on January 7, 9, and 10. After a separate evidentiary hearing and rehearing, the trial judge on August 25, 1980, entered an order denying all of the motions. (R.371.) The statements and tangible items were presented at trial over counsel's objections. The Florida Supreme Court affirmed the denials on appeal. (App. A.)

On September 2, 1980, a jury of the Pinellas County Circuit Court, found petitioner, Robert Brian Waterhouse,

---

1/ Numbers preceded by "R." refer to pages in the record on appeal to the Supreme Court of Florida.

guilty as charged. (R.389.) After a separate penalty trial, the trial judge accepting the same jury's recommendation of death, sentenced petitioner to die in the electric chair. (App. B, R.2305.) On September 9, 1980, petitioner moved for a new trial on grounds that included the trial court's errors in denying petitioner's motions to suppress, tendered contrary to the Fourth, Fifth, Sixth, and Fourteenth Amendments. (R.406.) The motion for a new trial was denied. (R.413-414.) On September 15, 1980, the Court entered written findings of fact in support of the sentence. (App. B.) On February 17, 1983, the Supreme Court of Florida affirmed the conviction and sentence and on April 27, 1983, denied a motion for rehearing. (App. C.)

2. The Motions to Suppress.

In the trial, the State's case on the guilt of petitioner and the requested death penalty centered on a series of self-incriminating statements alleged to have been made by petitioner to police officers without presence of counsel both before and after his arrest on January 7, 9, and 10, and on items of tangible evidence including blood, hair, and fiber samples obtained from petitioner's car after it had been seized by the police and later searched pursuant to a warrant obtained after the seizure. These statements and items of tangible evidence were the subject of defense counsel's motions to suppress on the grounds (1) that the statements were (i) either made without the presence of counsel after counsel had been requested (some made even after counsel had been appointed), (ii) or were obtained as the result of an illegal arrest or detention, and (2) that the tangible evidence was obtained as the result of either

an illegal arrest or detention or a seizure of petitioner's automobile without probable cause. These issues were raised in petitioner's brief to the Florida Supreme Court. (App. A, pp. 4a-5a.)

At the evidentiary hearing held on August 22, 1980 (R.435-581), Sergeant Gail Murry, who was in charge of the homicide investigation, testified concerning the events leading to the search of petitioner's automobile and the interrogations of petitioner by the police. According to her testimony, on the morning of January 3, 1980, she responded to a call concerning the discovery of a body near the shoreline in the Lassing Park area of St. Petersburg. (R.445.) When she arrived at the scene she found the nude body of a white female laying face down in the mud, approximately 20 feet from the high tide mark. (R.445.) The victim had suffered severe lacerations to the head and scalp area, numerous bruises around the throat, and a swollen and blackened right eye. (R.445.) A tampon had been shoved in the victim's mouth, and it was later determined that she was having a menstrual period at the time of death. (R.445.) Examination of the general area around where the body was discovered indicated to Sergeant Murry and other officers at the scene that the assault had occurred elsewhere and that the body had been dragged into the water after being transported there. (R.446.) No tire tracks were found, but the grassy area of the park did not hold tire marks, as was demonstrated by police cars which were driven on it. (R.446.)

On January 5, 1980, the St. Petersburg Police Department received an anonymous phone call from a male with a New England or New York accent who said "In reference to

the bay murder, I have a license number for you - GMU603. All the information is right there." The caller then hung up. (R.448.) This conversation was taped. The license tag number was determined to belong to a 1973 Plymouth registered in the name of petitioner, Robert Brian Waterhouse, residing at 1675 Pinellas Point Drive South. (R.448.)

A check of police records disclosed that petitioner was on lifetime parole for the murder of a 77-year old white female in New York State. (R.449.) Sergeant Murry testified that upon further investigation she learned that the victim had been beaten and choked to death and left nude. (R.449.) As a result of this information, the St. Petersburg Police Department initiated a surveillance of the residence and person of petitioner. (R.450.)

On January 7, 1980, the police learned the identity of the victim from her neighbors' missing person's report. (R.450.) The victim was one Deborah Kammerer. She was last seen by her friends, Yohan Wenz and Carol Byers, at the ABC Lounge on Fourth Street of St. Petersburg on the evening of January 2, 1980. (R.451.) Her friends informed police that they had accompanied her to the lounge that night but had left her there shortly before midnight. (R.451.) Kyoe Ginn, a bartender at the ABC Lounge, identified a photograph of Deborah Kammerer and indicated that she was a frequent patron of the lounge. (R.452.) The bartender also informed the officers that the victim had been in the bar on the evening of January 2, 1980, and had left with a man shortly after midnight. (R.452.) She identified petitioner from a group of photographs and stated that he was the man who had left the lounge with the victim on the evening of

January 2, 1980. (R.452.) She indicated petitioner also was a frequent patron of the lounge and well-known to her. (R.452.)

Sergeant Murry testified concerning her interview with Mr. and Mrs. Foster, petitioner's aunt and uncle, and a friend of the family, Mr. Norwood, all of whom resided at the Pinellas Street address. (R.453.) Sergeant Murry stated that the three interviewees had New England or New York accents similar to that she had heard on the tape of the anonymous phone call. (R.453.)

On the basis of the above information, Sergeant Murry and other officers decided to try to persuade petitioner to come to the police station voluntarily for questioning about the case, but not to arrest him. (R.455, 486.) Detectives Leake and Stellges were assigned to surveillance of petitioner on the evening of January 7, 1980. The detectives followed petitioner's car from the ABC Liquor Lounge to Club 28. After petitioner had gone into Club 28, come out, and gotten back into his car, Detective Leake directed a marked police car to pull petitioner over to the side of the road. (R.528, 533.)

Petitioner, who was called as a witness on his own behalf during this evidentiary hearing, testified that the marked police car that stopped him had its flashing lights on and that three or four other marked and unmarked police cars immediately pulled up around him. (R.540.) Detective Leake's testimony also indicated that there were additional police cars in the area. (R.533.)

According to Detective Leake, Detective Stellges identified himself as a police officer, asked petitioner for

his driver's license, which petitioner then produced, and told petitioner that the detectives were investigating a homicide and would like him to come to the police station to talk. (R.529.) According to the detective's testimony, petitioner was told that it was very important that he come to the station, but that he did not have to come if he did not want to. (R.529-530.) Petitioner went to the station driving alone in his own car and following Detective Stellges' car. (R.530.) Detective Leake followed petitioner in another police car. (R.530.) On cross examination, Detective Leake stated that there were two unmarked police cars following petitioner's car which was preceded by the marked police car in which Detective Stellges was then driving. (R.534.)

Petitioner testified that the only reason he followed the officers to the police station and did not refuse to go there was that the police had his license and refused to return it. (R.540.) When petitioner asked the police why he could not have his license back if he was not "under arrest or - - - didn't do anything wrong," Detective Stellges, according to petitioner, said, "Well, you will have to go to the police station to get it back." (R.540.) In addition, petitioner testified that he was escorted to the police station by at least four police cars and that one of them drove alongside him at least part of the way, thereby boxing him in. (R.540.) Petitioner also stated that he felt that the police could have pulled him over for driving without a license, a crime in the State of Florida, if he had not accompanied them to the station to retrieve his license. (R.540.)

At the evidentiary hearing, Detective Stelljes admitted taking the license, but added that petitioner never asked for it back. (R.562.) Other than petitioner's testimony, there was no testimony presented as to when or whether Detective Stelljes or other officers returned the license. Detective Leake who was with Detective Stelljes at the scene of the original stop testified that he did not observe Detective Stelljes or any other officer return the license then or later. (R.533.)

When petitioner arrived at the police station at 10 p.m. on the night of January 7, 1980, accompanied by his escort of police cars, he parked his car in a public parking space outside the station. (R.462, 530.) It was placed under guard. (R.462.) Upon entering the police station, petitioner was advised of his rights by Sergeant Murry and he signed a form waiving his rights. (R.456, 459.) Petitioner was then taken to Sergeant Murry's office on the second floor. (R.1813.) He reportedly was informed that he was not under arrest and that he was free to go at any time. (R.460-461.) Petitioner was then questioned by the two officers for some 45 minutes to an hour. (R.548, 1856.) During this interview, petitioner denied committing the murder and denied that he knew a Debbie or Debbie Kammerer. (R.1842.) He admitted that he had been at the ABC Lounge on January 2, 1980, denied that he had left with a girl, and stated that no one else had used his car for the last two weeks. (R.1843.) At the end of the interview, petitioner asked once again whether he was free to leave and upon the officer's response that he was, he did so. (R.461, 557.) Petitioner, however, was not permitted to take his car with him; instead the police towed it into a basement parking lot

under the police station for safeguarding. (R.462, 513, 542.) According to petitioner, he received the driver's license back only when he was departing. (R.558, 560.)

During the time petitioner was inside the police station, Detective John W. Long conducted a visual inspection of petitioner's 1973 Plymouth reportedly from the outside through an open window with a flashlight. (R.462, 511.) Detective Long testified that he observed sand on the floor in front of the driver's seat and what appeared to be two dark stains directly behind the driver's seat. (R.512.) Based upon Detective Long's observations and other information, the police obtained a warrant to search the vehicle at 5 a.m. on January 8, 1980, and a search was conducted shortly after. (R.513-514.)

The search of the automobile disclosed blood stains analyzed as type A, the same blood type as that of the victim. (R.466-467.) Based on this information and the other information described above, at 5 p.m. on January 8, 1980, the police obtained a warrant for the arrest of petitioner. (R.466.)

Petitioner was arrested by Sergeant Murry and Detective Hitchcox on the next day, January 9, 1980. (R.467.) During the ride back to the police station, Sergeant Murry advised petitioner of his rights from a Miranda card, including the right to remain silent and the right to counsel. (R.469-470.) Sergeant Murry then asked, "Having these rights in mind, do you wish to talk with us now." Petitioner did not respond. (R.470.) After a few minutes, Detective Hitchcox showed petitioner a picture of Debbie Kammerer and asked if he knew her. (R.470, 1845.) Petitioner reportedly said, "Yes, that's Debbie." In response

to Sergeant Murry's statement -- "Oh, well, then you do know her" -- petitioner reportedly indicated that he did. (R.471, 1846.) Sergeant Murry also testified that Detective Hitchcox said to petitioner, "We were right, weren't we, about what happened Wednesday night [the night of the murder]," referring to the interview at the police station on the previous night.[2/] (R.471.) Petitioner reportedly replied, "Might." (R.471.)

At some point, while still in the car, petitioner said to the officers, "I think I want to talk to an attorney before I say anything else." (R.471.) During the booking that afternoon, the officers told petitioner that they would come up to the fourth floor later and give him the opportunity to talk with them and answer any questions he might have. (R.472.) Sergeant Murry testified that petitioner was cooperative and that it was her impression he would be interested, although she could remember no statement to that effect. (R.472-473.)

According to Sergeant Murry, at 2 or 2:30 p.m. in the afternoon of January 9, 1980, Detective Hitchcox and she commenced their interrogation of petitioner in a small padded interrogation room with no windows.[3/] (R.473, 1858-1862.) Sergeant Murry testified that petitioner seemed "rather sad and down" as frequently happens when people have

---

2/ At trial, Sergeant Murry, but not Detective Hitchcox, testified that the latter's question was, "We were correct, weren't we, in stating you were involved in this case?" (R.1817.)

3/ At one point in the evidentiary hearing, Sergeant Murry indicated that this interview took place at 2 a.m. in the morning, presumably of January 10, 1980 (R.473), but later she indicated it was on Wednesday afternoon. (R.475.) The latter seems to be the correct time, since the interrogation took place during the same afternoon as the booking. (R.475.) Petitioner was booked at 1:20 p.m. on the 9th of January. (R.8.) The error about the time of this interrogation continued through to the decision of the Florida Supreme Court.

been arrested. (R.473.) Petitioner refused to listen to another reading of his rights from the Miranda form. Petitioner was upset and crying that his life was over and he was going to the electric chair. (R.473, 1858.) He refused to sign the blank waiver form, similar to the one that he had signed previously. (R.474, 475.) He reportedly stated that he did not want his rights. (R.473.) Sergeant Murry testified that at another point petitioner stated, "I want to talk to you but I don't want my rights." (R.474.) In response to which, Sergeant Murry tried to explain to him that the rights were his and that by law the officers had to advise him concerning them. (R.473.) Sergeant Murry testified that petitioner responded affirmatively to her question as to whether he understood what he said would be repeated in court. (R.475.) However, petitioner reportedly also made statements that the officers should tell it to the court as people not as police officers. (R.474.)

The officers then proceeded to question petitioner for four hours. (R.476, 1850.) During the interrogation, petitioner would become very upset and would start crying. Sergeant Murry testified that the officers would then stop questioning him until he recovered. (R.1850.) The interrogation finally terminated when, after another bout of crying, petitioner said, "You know, I really am tired. I think I'd like to talk to my lawyer. Would you all come back later tomorrow?" (R.477.) Sergeant Murry gave a second version of petitioner's statement as, "Will you come back tomorrow? I'm kind of tired and I think I want to talk to my attorney." (R.477.)

During the interrogation on the afternoon of the 9th of January, 1980, petitioner made various statements to the officers that were later admitted into evidence over the objection of defense counsel. (R.506, 1847-1849.) He stated that nothing would bring "her" back, in apparent reference to the victim. He talked about wanting to live a normal life and repeated that his life was now over. (R.506, 1847.) He stated that he had a problem in that he really liked sex, that he had a drinking problem, that when drinking he tended to have a problem with violence, and that he found himself doing things over which he had no control. (R.507, 1848.)

On the morning of January 10, 1980, petitioner first went to an advisory hearing at which he was advised of the complaint against him and a Public Defender was appointed to represent him. Then around noon he was interviewed for several hours by a representative from the Public Defenders' Office. (R.478, 490.) Later that afternoon, Sergeant Murry and Detective Hitchcox conducted the final interrogation of petitioner, but without advising anyone in the Public Defenders' Office that their client was being interrogated. (R.499-500.) Sergeant Murry admitted on cross examination that the interrogating officers were aware that the Public Defenders' Office had been appointed as counsel and that petitioner had been interviewed by a representative of that office. (R.500.)

During the afternoon interrogation on January 10, 1980, the officers reportedly were told again by petitioner that he did want his rights read but he would not sign the written waiver form, that he wanted to talk to the officers

as people, and that he did not want to confess but "wanted to tell [the officers] about it." (R.479.) When trying to explain to petitioner his rights, Sergeant Murry told him that she did not really know "if what [he] was going to say [could] be used in court." (R.479.) As on the previous afternoon, petitioner is described as having become "very upset." Petitioner also was extremely "paranoid" and expressed fears that the officers were going to try to frame him. (R.481.) He reportedly would break off talking to cry and then start talking again, just as he did in the interrogation on January 9. (R.481.)

After two or three hours of questioning, the interrogation terminated with petitioner again telling the officers that he was tired and confused and that he did not want to talk anymore but wanted them to come back. (R.481.) The officers did not return because petitioner's appointed counsel directly advised the officers that they could not conduct any further interrogations of his client. (R.481, 502.)

On cross examination, Sergeant Murry admitted that petitioner had advised the officers that he did not want to confess and that he did not want to talk about Wednesday, and also that petitioner was more paranoid and illogical than at the previous interrogation. (R.501-503.)

In the interrogation on January 10, 1980, petitioner is alleged to have made additional damaging statements, which were admitted into testimony over counsel's objections. (R.506, 1850-8.) He also indicated that he liked sex any way he could get it, anal, oral, or vaginal. (R.1850.) He said he had no problem with girls and never

wanted to commit rape. (R.1851.) He said that sometimes he would become sexually aroused and that if he found out that the girl was "cursed", this would frustrate him. (R.1851.) When the officers asked when this problem had occurred, he reportedly told them that it had occurred Wednesday night, which the officers took to be a reference to the night of the murder. (R.1851.) He is alleged to have stated that he would sometimes "flip out" and do terrible things. (R.1853.) He further indicated that he had stopped drinking since Wednesday night, when he had drunk a lot. (R.1853.) And, according to Sergeant Murry's testimony, petitioner in discussing that Wednesday night and his problems, stated, "Well, nobody wants to go to jail and you do what you have to do to protect Bobby Waterhouse." (R.1825-1826, 1854.)

At the close of the evidentiary hearing, the trial judge denied defense counsel's motions to suppress, except for the last statements made in custody during the afternoon interrogation on January 10 after the Public Defenders' Office had been appointed petitioner's counsel. (R.579.) The trial judge found that petitioner's failure to reexecute the Miranda waiver on that occasion meant there was no waiver of his right to have his appointed counsel present. (R.579.) As to the remaining issues, the trial judge found that petitioner had gone to the police station on the night of January 7 voluntarily and had been interviewed voluntarily. (R.580.) The judge also found that all other statements made by petitioner were made freely and voluntarily and after he had been fully advised of all rights to which he was entitled. (R.580.)

3. The Trial.

On the morning of January 3, 1980, Glenn Shine was walking his dog along the waterfront and noticed an apparently lifeless naked body lying face down on the mud flats. (R.903, 906.) Another nearby resident made a phone call to the police. (R.907.)

Officers from the St. Petersburg Police Department arrived at the scene, determined that the body was dead, and proceeded to secure the area and examine it for evidence. (R.913-937.) Woman's clothing belonging to the victim was discovered scattered over a wide area near the murder scene. (R.929, 949.) Marks indicating that something had been dragged were found in the sand near the high tide mark. (R.953.) Abrasions were found on the body indicating that it had been dragged feet first. (R.953.)

Testimony by the Deputy Chief Medical Examiner for Pinelles County indicated that the victim had died as a result of drowning at some time between 3:45 and 7:45 a.m. on the morning of January 3, 1980. (R.1035.) The victim had suffered numerous bruises and lacerations prior to the time of death by drowning. (R.1036.) There was no indication of vaginal penetration but there was evidence indicative of anal penetration. (R.1037.) In addition, injuries found in the area of the victim's rectum suggested the insertion of some blunt object other than a male penis. (R.1039.) In response to a hypothetical of the prosecutor, the examiner stated that the injury could have been caused by, among other things, the insertion of an object the size of a Coke bottle. (R.1039-1040.)

The victim's blood was type A. (R.1040.) Examination of the rectum revealed the presence of enzymes that might have come not only from type A but also type B blood, even though the expert testifying admitted the source of the enzymes indicating type B blood could have been something other than blood. (R.1042.) There was expert testimony that the injury to the rectum occurred prior to death and that frothy water found in the lungs of the victim indicated that she was alive but unconscious when she was dragged into the water. (R.1056-1060.)

Kyoe Ginn, the bartender at the ABC Lounge, testified that both the victim and petitioner were regular customers of the lounge. (R.1114, 1116.) On the evening of January 2, 1980, the bartender saw the two together in the bar after the victim's friends had left. (R.1119.) Approximately one half hour later the bartender observed the victim and petitioner leaving the lounge together. (R.1120.)

Petitioner's supervisor at work, Mr. Van Vuren, testified that when petitioner came to work on the morning of January 3, 1980, he asked to have the day off because he was feeling "rough." (R.1138, 1140.) Petitioner had red marks on each side of his face. (R.1140.) When the supervisor saw petitioner again on January 7, 1980, he observed makeup on petitioner's face, and there were new front seatcovers in petitioner's 1973 Plymouth. (R.1143.) Petitioner's supervisor also testified, over objections of defense counsel, that petitioner had told him that he liked anal sex and slapping women when performing that act. (R.1157, 1158.) Petitioner's girlfriend of three months testified that petitioner had stated a preference for anal intercourse and had engaged in it with her on more than one

occasion. (R.1319.) A boyfriend of the victim testified that the victim intensely disliked anal intercourse. (R.1271.)

Mrs. Foster, the aunt of petitioner, was unable to indicate his whereabouts during the early morning of January 3. (R.1248.) She testified that petitioner had stayed home from work on Thursday, January 3, because he was not feeling well. (R.1249.) She did not observe any bruises on his face. (R.1254.) On the afternoon of January 3, she saw petitioner washing the outside of his car. (R.1251.) The testimony about washing the car was corroborated by Mr. Norwood, the family friend who lived in the same house, who added that he might have been cleaning the inside also. (R.1259.)

A crime scene technician identified items of evidence, including blood, hair and fiber samples, taken from petitioner's car. (R.1322.) The technician was permitted to testify, over the objections of counsel for petitioner, that ten baggies of marijuana had been found in the glove compartment. (R.1365.) Other expert testimony indicated that the enzymes of the type A blood found in petitioner's car was similar to that of the victim, not of the petitioner (R.1460-1502), that blood had been cleaned off or wiped off a leather jacket belonging to the petitioner and various parts of the interior of his automobile (R.1544), and that the location of splattered blood stains in the automobile indicated that the victim had been struck with great force with a hard object while in the right front passenger's seat of the vehicle. (R.1579, 1616, 1620.) In addition, hair samples from petitioner's car were found

in the victim's coat and pants, discovered at the scene of the crime. (R.1720-1721.)

An inmate who shared a cell with petitioner prior to petitioner's trial was permitted to testify, over defense counsel's objections, to a statement by petitioner that "I wonder how he would like a Coke bottle up his ass like I gave her." (R.1794.) The inmate was permitted to describe the circumstances under which the statement was made over the objections of defense counsel. Petitioner allegedly was frustrated in a homosexual attack on a new cellmate when he made the statement. (R.1794.)

Sergeant Murry and Detective Hitchcox testified as to petitioner's pretrial statements discussed above at pages 14 and 15. (R.1836-1888.)

A bouncer at the ABC Lounge on the evening of January 2, 1980, testified for the defense that another man had been sexually harassing the victim on that night, that petitioner had left the bar alone, and that the police had refused to follow up on those leads. (R.1931-1949.)

The trial jury found petitioner guilty of murder in the first degree on September 2, 1980. (R.389.)

4. The Sentencing Trial.

At the sentencing trial, petitioner's previous conviction for second degree murder in New York was introduced, and an Officer Hawes, retired from the Long Island Police Department, testified as to the circumstances of that case, over the objections of defense counsel. Only one witness appeared on behalf of petitioner, his aunt Mrs. Foster. (R.2257.)

A majority of the jury advised and recommended that the Court impose the death penalty on the defendant.

(R.2307). The trial judge then sentenced petitioner to death in the electric chair. (R.2305.)

On September 15, 1980, the trial judge filed an order with findings of fact supporting the death penalty. (Appendix B.) The trial judge found the following aggravating circumstances: the previous conviction in New York for murder in the second degree and life-time parole at the time of the murder; the previous conviction in New York involving the use or threat of violence; the murder while engaged in the commission of a rape, a life felony; the murder committed for the purpose of avoiding or preventing a lawful arrest by eliminating the victim as a witness to the rape; and the nature of the murder designed to inflict a high degree of pain upon the victim. (App. B.) The trial judge found no mitigating circumstances. (App. B.)

REASONS FOR GRANTING THE WRIT

This case raises basically four important questions under the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. The first is what constituted a request for counsel and a waiver of that request by the petitioner when he was in custody that would permit the police to continue questioning that person. The second is whether the police should have continued to interrogate petitioner after counsel had been appointed. The third is whether seizure of petitioner's driver's license and the presence of a police escort negated the voluntariness of petitioner's going to a police station, thereby requiring the exclusion of statements made there and tangible evidence taken from petitioner's car which was seized as a result of the trip to the station. The fourth is whether there was

probable cause to impound petitioner's car before a search warrant had been obtained.

In reaching its decision affirming the trial court's conviction and sentence, the Florida Supreme Court misconstrues several decisions of this Court upon which it expressly relies and others which should have been applied. The importance of these issues -- vindication of constitutionally guaranteed rights that protect individuals from improper treatment by officers of the law and that go to the heart of our adversarial legal system -- make them particularly appropriate for resolution by this Court.

ONE

PETITIONER'S PRE-TRIAL STATEMENTS TO THE POLICE WERE OBTAINED IN VIOLATION OF PETITIONER'S RIGHT TO COUNSEL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The decision of the Florida Supreme Court would permit police officers deliberately to ignore petitioner's reiterated requests to speak to counsel before being subjected to additional interrogation -- a basic right guaranteed by the Fifth and Fourteenth Amendments and repeatedly upheld by the opinions of this Court. Miranda v. Arizona, 384 U.S. 436 (1966) and Edwards v. Arizona, 451 U.S. 477 (1981).[4/] It would permit them to circumvent such requests by initiating further communications in a custodial setting

---

4/ The right to counsel during custodial interrogation is well settled. In Miranda, this Court directed that "[i]f an individual states that he wants an attorney, the interrogation must cease until an attorney is present." At 474. Later cases by this Court have emphasized the strict character of the prohibition protecting an individual's right to counsel. For example, in Fare v. Michael C., 442 U.S. 707, 719 (1979), the Court referred to Miranda's "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease."

in order to elicit statements that they can construe as waivers, even though not intended as waivers by petitioner, with the ultimate purpose of eliciting incriminating statements in violation of the Fifth Amendment.

In affirming the trial court's refusal to suppress certain potentially incriminating statements made by petitioner after petitioner had indicated a desire to have counsel present, the Supreme Court of Florida seriously misconstrued the opinions of this Court in both Miranda and Edwards.

In Miranda, this Court stated that if during a custodial interrogation an individual "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45 (emphasis supplied). Other decisions have defined the scope of "in any manner." For example, in Stumes v. Solem, 671 F.2d 1150, 1153 (8th Cir. 1982), cert. granted, 51 U.S.L.W. 3938 (July 6, 1983) (No. 81-2149), the Eighth Circuit employed Miranda to exclude information obtained from questioning after defendant said: "I would rather not talk about it . . . until I talk to my attorney," and in White v. Finkbeiner, 611 F.2d 186, 189-90 (7th Cir. 1979), vacated and remanded on other grounds, 451 U.S. 1013 (1981), the Seventh Circuit held that, although equivocal, the phrase "I'd rather see an attorney," constituted a sufficient request for counsel. See also Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978) ("Maybe I should have an attorney" considered a request for a lawyer); United States v. Clark, 499 F.2d 802, 805 (4th Cir. 1974) ("I had better talk to a lawyer" considered a request for a lawyer).

According to the testimony of the police, petitioner's statements requesting counsel were: (1) "I think I want to talk to my lawyer before I say anything else" (in the police car on the way to the station) (R.471); and (2) "You know, I really am tired. I think I'd like to talk to my lawyer. Would you all come back later tomorrow?" (at the end of the January 10 early morning interrogation). (R.477.)[5/] When compared with the requests for counsel approved in the cases cited above, petitioner's statements clearly indicate his desire to have counsel. However, the Supreme Court of Florida, in spite of the settled interpretation of what constitutes a request for counsel protected by the Fifth Amendment, found that petitioner's statements that "he thought" he should talk to an attorney were at most "equivocal requests to consult with counsel." (App. A, p. 7a.)

The Florida Supreme Court not only mischaracterized petitioner's requests for counsel, but it ignored other indications that throughout these interrogations petitioner desired not to speak about the crime with which he was being charged nor to confess, even when he was willing to speak about other matters. For example, after petitioner's rights were read to him in the police car, petitioner did not respond to Sergeant Murry's question as to whether he wished to talk, "having these rights in mind." (R.470.) After his arrest on January 9, petitioner consistently refused to sign the waiver cards proffered to him, even though he had

---

5/ Sergeant Murry's testimony gave two versions of petitioner's request made at the end of the early morning interrogation on July 10. The second version was: "Will you come back tomorrow? I'm kind of tired and I think I want to talk to my attorney." (R.477.)

previously signed one before his arrest. (R.474-5, 479-80.) He also stated frequently that he wanted to talk to Sergeant Murry and Detective Hitchcox as people not police officers. (R.474, 479.)

Of course, even if petitioner's requests were "equivocal," they were still valid, since "under Miranda a request for an attorney need not be clear and unequivocal." United States Ex Rel. Riley v. Franzen, 653 F.2d 1153, 1159 (7th Cir. 1981) (citation omitted). An "equivocal" request has been held to permit the police to communicate further with petitioner while he was in custody, but only in a very circumscribed fashion, as was realized by the Florida Supreme Court in this instance, citing Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); and Nash v. Estelle, 597 F.2d 513, 517 (5th Cir.), cert. denied, 444 U.S. 981 (1979). (App. A, p. 7a.) However, any questions or other communications by officers are strictly limited to ones intended merely to clarify the equivocal request for counsel, not to elicit other information. Nash, 597 F.2d at 517.

The Florida Supreme Court went on to distinguish Edwards erroneously on the grounds that petitioner never explicitly stated that he did not want to talk to the police nor was he told by the police that he had to talk to them. (App. A, p. 7a.) On the basis of this finding the Supreme Court of Florida held that the police did not act improperly in visiting petitioner and questioning him further after his two "equivocal statements" expressing possible interest in seeing an attorney. (App. A, p. 7a.) This case should not be distinguished on these grounds, since petitioner did indicate that he did not want to talk to Sergeant Murry and

Detective Hitchcox as officers and being held in an interrogation room and being asked questions should not require that the police also explicitly state that petitioner had to talk to them.

The Florida Supreme Court also failed to properly apply the standards set by this Court in Edwards for determining whether petitioner waived his Fifth Amendment right to counsel. In Edwards, this Court strengthened the protections afforded by Miranda by requiring the additional safeguard that a valid waiver cannot be demonstrated where the suspect has not initiated the conversation, even if he has been advised again of his rights. 451 U.S. at 484-485.[6/] Under Edwards, if "the right to counsel [is] invoked, the accused must both initiate the subsequent communication and validly waive the right to counsel for the statement to be admissible." McCree v. Housewright, 689 F.2d 797, 802 n.8 (8th Cir. 1982). Accord Oregon v. Bradshaw, 51 U.S.L.W. 4940, 4941 (No. 81-1857) (U.S. June 23, 1983); Fields v. Wyrick, 682 F.2d 154, 159 (8th Cir.), rev'd on other grounds, sub nom. Wyrick v. Fields, 103 S. Ct. 394, __ U.S. __ (1982). Thus, to initiate a conversation that would permit the Florida

---

6/ This Court held that:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-85.

Supreme Court to find a valid waiver, petitioner would have had to show that he wanted to waive his right to counsel. "Initiation" by a suspect in custody has required that the suspect actively seek out the conversation. See, e.g., McCree, supra, (interrogation initiated by suspect knocking on cell door and saying to police officer that he wanted to make a statement).[7/]

The officers initiated both of the interrogations on January 9 and 10, by having petitioner taken from his cell to the interrogation room. Each followed closely upon a request by petitioner to speak to his lawyer. Petitioner was in custody. In the interrogation room on the fourth floor of the jail, he was subjected to further questioning. In the case of the first interrogation, petitioner's supposed invitation consisted of an "indication of interest" in, not an explicit invitation to, the officers telling him about the next steps in the case. Moreover, Sergeant Murry testified that it was only her impression that petitioner was interested in hearing about the next steps; she could not recall any explicit request. (R.496-497.) And, the officers spoke to petitioner of coming to see him only to talk not to question. (R.497.) The second interrogation was preceded by a request that the officers return when petitioner was less tired and after he had seen and talked to a

---

7/ See also, United States v. Gordon, 655 F.2d 478 (2d Cir. 1981) (suspect expressed a desire to inform on another person who should have been arrested); State v. Brezee, 66 Haw. 163, 657 P.2d 1044 (1983) (defendant against advice of counsel invited officer to cell and declared he did not want an attorney); Payne v. State, 424 So.2d 722 (Ala. Crim. App. 1982) (defendant asked to meet with police); People v. Thomas, 98 Ill. App. 3d 852, 424 N.E.2d 985 (1982), cert. denied, __ U.S. __ (1982) (defendant inquired about an accomplice's statements about defendant's involvement in the crime); and State v. Pittman, 210 Neb. 117, 313 N.W.2d 252 (1981) (defendant told police he was being framed by co-defendants).

lawyer. (R.477.) Thus, under the circumstances, neither interrogation can be considered "initiated" by petitioner. And, where the suspect in custody did not initiate the questioning, there can be no waiver under Edwards.[8/]

This Court's most recent decision on the Edwards rule, Oregon v. Bradshaw, resulted in a plurality decision in which eight of the nine justices arguably hold that Edwards announced a per se, prophylactic rule. 51 U.S.L.W. at 4941; see also 51 U.S.L.W. at 4944 n.2 (Marshall, J., dissenting). Nevertheless, Justice Powell in his concurring opinion pointed out the continued confusion in the lower courts as to whether the Edwards rule was per se rule. 51 U.S.L.W. at 4942. Petitioner's case, which reveals the dangers inherent in a lower court's failure to use Edwards' per se rule -- namely court affirmation of police attempts at circumventing a suspect's Fifth Amendment right to counsel -- would be a proper vehicle to resolve the confusion of which Justice Powell wrote.

In addition, Oregon v. Bradshaw revealed a second area in which the further guidance of this Court is needed. The plurality and the dissent differed on the meaning of "initiation." The plurality was satisfied with a more general conversation about the investigation, perhaps more than what is required by the custodial relationship. 51 U.S.L.W. at 4941. The dissent wished to require that the conversation initiated be more strictly about the subject matter of the investigation. 51 U.S.L.W. at 4944. A resolution of this constitutional issue by this Court would

---

8/ This case is stronger than White v. Finkbeiner, 687 F.2d 886 (7th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3001 (U.S. June 18, 1982) (No. 81-2340), where the court excluded statements made following police-initiated questioning two days after defendant had indicated a disinterest in talking to police and had said: "I'd rather see an attorney." Id. at 887.

serve to vindicate the rights of petitioner -- which rights have been denied by the Florida Supreme Court decision -- and would send a clear signal to police that they must abide by the Edwards rule and not initiate communications or set up designed to elicit self-incriminating statements in the absence of counsel once counsel has requested.

The second Edwards test requires that petitioner must knowingly and "validly waive the right to counsel for [a] statement to be admissible." McCree, 689 F.2d at 802 n.8. This Court has long held that "courts [will] indulge in every reasonable presumption against waiver," Brewer v. Williams, 403 U.S. 387, 404, rehearing denied, 431 U.S. 925 (1977) (mem.),[9/] and that this presumption can be overcome only by proof of "an intentional relinquishment or abandonment" of that right. Id., quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). This Court very recently held that where reinterrogation follows a suspect's request for counsel "the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during interrogation." Oregon v. Bradshaw, 51 U.S.L.W. at 4941. Furthermore, pursuant to Edwards, such an abandonment must be voluntary, knowing, and intelligent. 451 U.S. at 482.

In the instant case, although the State did not sustain the burden of demonstrating petitioner's voluntary, knowing, and intelligent abandonment of his right to counsel, the Florida Supreme Court still found that petitioner's statements were voluntary and that he had waived his right to counsel.

9/ This presumption had previously been stated in Brookhart v. Janis, 384 U.S. 1, 4 (1965), and Glasser v. United States, 315 U.S. 60, 70 (1941).

In cases where it has been held that suspects waived their right to counsel, the waivers have been explicit. In Wyrick v. Fields, 103 S. Ct. 394, __ U.S. __ (1982), this Court held that defendant voluntarily, knowingly, and intelligently waived his right to counsel and "initiated" further dialogue with the authorities when he "appeared voluntarily and stated that he did not want counsel present during the interrogation." 103 S. Ct. at 395.[10/] In the immediate case, petitioner did not appear voluntarily, but was in custody at the time he was subjected to interrogation.

It is well-established that "evidence that an accused has previously asserted his right to confer with counsel is a factor which weighs heavily against a finding that a subsequent uncounseled confession is voluntary." United States v. Clark, 499 F.2d at 807. Indeed, "[o]nce the [right to counsel] has been asserted, . . . an interrogation must not be permitted to seek its retraction, total or otherwise." Id. at 807, quoting United States v. Crisp, 435 F.2d 354, 357 (7th Cir.), cert. denied, 402 U.S. 947 (1970).

The present case is much like United States v. Henry, 447 U.S. 264 (1980), in which this Court held that the government violated defendant's right to counsel by intentionally creating a situation likely to induce a defendant to make incriminating statements without the aid of counsel. Id. at 274.

It is clear from the testimony of Sergeant Murry that petitioner was in a highly confused and emotional state when he was interrogated by the officers on January 9 and

---

10/ In Wyrick, defendant had not requested counsel at the time he made this statement.

10. (R.473, 474.) The officers pretended to be friendly and sympathetic and indicated they wanted to talk. The interrogations each lasted for several hours. The officers stopped questioning to let petitioner cry, but started back up whenever he stopped crying. (R.476.) Likewise, on the afternoon of January 10, the officers sequestered and further interrogated petitioner, even though they recognized that he was "confused" and "very upset." (R.479, 480, 481.) Moreover, this last interrogation was conducted without contacting anyone in the Public Defender's Office in spite of the officers' knowledge counsel had been appointed to the case and awareness of petitioner's previous requests for counsel and his confused state. (R.499, 500.) As in Henry, the State violated petitioner's right to counsel by creating and exploiting situations in which petitioner was likely to make self-incriminating remarks in the absence of counsel.

Since petitioner neither "initiated" conversation with the police nor waived his Fifth Amendment right to counsel, his original statement to the police officers that he wished to see an attorney before he made any further statements should have terminated further interrogation. His continued interrogation subsequent to a second request to speak with an attorney is a blatant breach of his constitutional right to counsel.

Thus, we believe that consideration of the present case, in which the decision of the Florida Supreme Court rests upon an erroneous reading of Edwards and other right to counsel cases and upon a faulty analysis of the circumstances surrounding petitioner's request for counsel, would give the Court an opportunity to illuminate further for lower courts the scope of the constitutional right to counsel and under what circumstances that right may be waived.

TWO

PETITIONER'S PRE-TRIAL STATEMENTS TO THE POLICE WHO FAILED TO ADVISE PREVIOUSLY APPOINTED COUNSEL OF THE INTERROGATION WERE OBTAINED IN VIOLATION OF PETITIONER'S RIGHT TO COUNSEL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In this case, clear evidence was presented at the hearing on petitioner's Motion to Suppress and during the trial that Sergeant Murry and Detective Hitchcox proceeded with the final interrogation of petitioner on the afternoon of January 10, 1980, without informing petitioner's attorney just appointed by the Court a couple hours before at the advisory hearing. (R.499-500.) Sergeant Murry admitted that she knew that petitioner had counsel. (R.500.) She also had been present for both of petitioner's requests for attorney. The record suggests that failure to inform was a knowing one designed to avoid exactly what subsequently occurred -- instructions from the court-appointed attorney for the officers to cease their interrogations.

In the absence of informing counsel, the alleged waiver of the request for counsel expressed the previous afternoon should not have been treated as one by the Florida Supreme Court, as was originally seen by the trial court. For the trial court originally ruled that the statements made during this last interrogation session were inadmissible because after counsel had been appointed petitioner could not be considered to waive his request for counsel. (R.388, 579, 580.) Later the trial court reversed its ruling over petitioner's counsel's objections. (R.411, 412, 432.) The Florida Supreme Court in affirming the trial court's denial of petitioner's motion to suppress argued that there is no per se rule requiring a notification of counsel, and went on

to hold that petitioner had knowingly waived his right to counsel. (App. A, p. 7a.) Petitioner respectfully argues that the original ruling of the trial court was correct and that damaging statements allegedly made by him during the last interrogation should have been suppressed to protect his Fifth Amendment right to counsel for the following reasons.

The decision of the Florida Supreme Court is correct in stating that Massiah v. State, 377 U.S. 201 (1964) does not stand for a per se rule that would prohibit any voluntary and knowing waiver of a right to counsel once counsel has been appointed. (App. A, p. 7.) Right to counsel may be waived. See Johnson v. Zerbst, 304 U.S. 458 (1938) and Escobedo v. Illinois, 378 U.S. 478 (1964). However, the waiver must be judged in light of the surrounding facts and circumstances, of which prior appointment and availability of counsel is one. See Brewer v. Williams, 430 U.S. 387 (1977) (involving police initiated contact when counsel available).

In support of its affirmance of the trial court's denial, the Florida Supreme Court also cited Witt v. State, 342 So. 2d 497 (Fla.), cert. denied, 434 U.S. 935 (1977) for the proposition that representation by counsel does not preclude waiver. Witt, however, is easily distinguishable from this case because it involved a suspect who expressly and directly indicated to the police that he wished to confess to the crime even though he was represented at the time by counsel. Here petitioner had several times expressly indicated that he did not want to confess (e.g. R. 501) and that he did not want to talk to the police officers as officers but as human beings, that is, not in an official context. Finally, petitioner's emotional and confused state reflected

in his crying and in his paranoia concerning the police (R.480-481) should have made it clear to the officers that petitioner was not voluntarily and knowingly waiving his right to counsel.

The Florida Supreme Court decision does not seem to take into account the clear testimony that the officers were fully aware that counsel had been appointed and that petitioner was placed in a situation in which it was highly likely that he would make incriminating statements because of his emotional state. Therefore, the Court should reverse the Florida Supreme Court's affirmation of the trial court's denial. Such a reversal would not create a new per se rule on the facts of this case. For example, it would not overrule other Florida cases such as Sanders v. State, 378 So. 2d 880 (Fla. 1st Dist. Ct. 1980) relied on by the trial court. There the officers were merely negligent in not inquiring further as to the existence of counsel. Witt, supra, also would stand. There the waiver was clearly voluntary and knowing.

Finally, petitioner respectfully submits that the Florida Supreme Court, in affirming the denial of petitioner's motions to suppress his statements made on January 10, 1980, has adopted such a broad and vague standard for determining when appointed counsel must be informed of an intention by police officers to conduct an interrogation of his client that the Fifth Amendment right to counsel will be ignored by police trying to get in one last interrogation that might lead to a waiver before counsel has an opportunity to fully advise his client, thereby cutting back on the additional protection that this Court has given to right to counsel in Edwards.

THREE

PETITIONER'S PRE-TRIAL STATEMENTS TO THE POLICE AND TANGIBLE EVIDENCE TAKEN FROM HIS AUTOMOBILE WERE OBTAINED AS THE RESULT OF AN ARREST OR DETENTION WITHOUT PROBABLE CAUSE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

On January 7, 1980, petitioner was stopped by a marked police car with flashing lights and immediately surrounded by three or four other marked and unmarked police cars, according to testimony presented at the evidentiary hearing and at trial. (R.533, 540.) Petitioner was informed that the police were investigating a homicide and it was important to talk to him at the police station. (R.529-530.)

When asked by Detective Stellje to produce his driver's license, petitioner did so. (R.540.) Petitioner testified that he asked for it back, but was told by Detective Stellje that he would have to go to the police station to get it back. (R.540.) Detective Stellje denied making this statement (R.534), but there is unrebutted testimony by petitioner that the license was given back to him only when he left the police station. (R.558, 560.) His story is also at least partially corroborated by Detective Leake's testimony that he never saw the license given back then or later (R.533), and he seems to have been with petitioner until they all drove off to the police station.

Petitioner also testified that the only reason he went to the police station was to retrieve his license. (R.540.) He felt that without it the police could have picked him up for driving without a license. (R.540.) Petitioner's version gains partial support at least from the fact that it was Detective Stellje's police car that he

followed to the police station (R.530), and Detective Stelljes was the officer who had taken and allegedly not returned the license. Moreover, two more police cars, at least, followed petitioner as he tailed Detective Stelljes' police car. (R.540.) Another may have pulled up alongside for a short time to completely box petitioner in as he drove along, although Detective Stelljes denied this. (R.540, 562.) Even three police cars in front and back of petitioner would have been enough to indicate to him that he was not to stop following Detective Stelljes to the station.

However, in spite of these generally agreed on facts, both the trial court and the Florida Supreme Court held that there had been no arrest and the trip to the station was voluntary. (App. A, p. 5a.) The Florida Supreme Court based its conclusion on the testimony of the police officers, who "said that [petitioner] was not arrested at this time." However, the words used by police officers to characterize their actions or their intentions are not controlling. Dunaway v. New York, 42 U.S. 200 (1979). The necessary inquiry is whether petitioner's trip to a police station escorted by police cars to retrieve his license and the 45-minute interrogation when there would have seemed to a reasonable person like police "custody."

This Court has very recently addressed other seizures, both of persons and of their property, that were less onerous than that found in the instant case. In U.S. v. Place, 51 U.S.L.W. 4844 (U.S. June 20, 1983) (No. 81-1916), this Court held that a 90-minute detention of a suspected narcotics courier's luggage was too lengthy to be a permissible stop under Terry v. Ohio. Petitioner was

detained for at least an hour, and his car was never returned. The facts in the other case, Florida v. Royer, 51 U.S.L.W. 4293 (U.S. March 23, 1983) (No. 80-2146) (consent to search luggage invalid where involuntary detention exceeded Terry v. Ohio temporary stop), are particularly apposite to the present case. Petitioner and Royer both produced licenses (and an airline ticket) upon request, but did not assent orally. Id. at 4294. Both were asked to accompany officers to another location (far away for petitioner) and their identification was not returned (as far as can be determined in the case of petitioner) until the police were finished. Id. Both were taken to small rooms and "confronted by two police officers - a situation which presents an almost classic definition of imprisonment." Id. (quoting State v. Royer, 389 S.2d 1007 (Fla. App. 1980) (en banc)). Finally, only Royer's luggage was detained, but petitioner's car was eventually seized. In both instances, a primary purpose was to obtain possession of a piece of a suspect's property in order to search it. The seizure occurred before there was sufficient reasonable cause to obtain a search warrant. Id.

Of course, under Dunaway v. New York, with sufficient probable cause the detention of petitioner and seizure of his car for a search would have been permissible. However, it is clear from the facts of the case that, contrary to the conclusion of the Florida Supreme Court (App. A, p. 5), the detectives had at most a reasonable suspicion centering on petitioner and his car. The anonymous tip linking petitioner's license plate and the "bay murder," the statement of a relative that petitioner had a violent

personality and could have done such a deed, the identification of petitioner with a man who accompanied the victim out of the bar on January 2, 1980, and petitioner's prior record were sufficient to create suspicions but not sufficient for probable cause to detain and question petitioner and seize his car without warrants.

The most direct piece of information, the anonymous tip about the license plate, could not have supplied probable cause because there was no basis for its reliability. There was no prior record. Aguilar v. Texas, 378 U.S. 108 (1964). It was not a declaration against interest. United States v. Harris, 403 U.S. 573 (1971). The identity of the caller was not known.

Moreover, that the police themselves felt the lack of probable cause can be seen in the fact that they permitted petitioner to leave the police station on the night of January 7 without arresting him and they resorted to an examination of the petitioner's car from outside instead of obtaining a warrant.

Accordingly, the Florida Supreme Court plainly erred not only in finding that there was no arrest and the visit to the police station was voluntary, but also that there was probable cause for stopping petitioner. (App. A, p. 5a.) The statements made by petitioner at the police station on January 7, 1980, were the product of his illegal detention and arrest in violation of his Fourth Amendment rights. See Clewis v. Texas, 386 U.S. 707 (1967). The seizure of petitioner's car was similarly without probable cause, and the evidence taken from the car was a direct result of the illegal seizure. Therefore, the Florida Supreme Court should have reversed the trial court's denials of petitioner's motions to suppress.

For the above reasons petitioner respectfully submits that his Fourth Amendment rights were violated.

FOUR

TANGIBLE OBJECTS TAKEN FROM PETITIONER'S CAR WERE OBTAINED AS THE RESULT OF AN ILLEGAL SEIZURE OF THE CAR WITHOUT PROBABLE CAUSE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

On the night of January 7, 1983, while petitioner was being illegally detained and questioned inside the police station, a detective was conducting a search of petitioner's automobile which was parked on a public street. (R.511.) Of course, the car was there because of the illegal detention of petitioner as was argued above. But even if petitioner had not been detained illegally, the impoundment of the car before a search warrant was obtained was a violation of petitioner's Fourth Amendment rights unless an exception exists.

The Florida Supreme Court admitted that there was a seizure without a warrant, but finds that the eventual issuance of the warrant showed there was probable cause for the initial impoundment. (App. A, p. 6a.) However, the Florida Supreme Court has twisted this Court's declaration in Chambers v. Maroney, 399 U.S. 42, 52 (1970), that seizing and holding a car before obtaining a warrant is the same as carrying out an immediate search without a warrant. Both require probable cause. See also Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion) (search warrant required where no immediate need to search the car). Eventual obtaining of a warrant does not prove probable cause for the initial seizure.

The question then becomes was there probable cause to impound the vehicle until a search warrant was obtained. Detective Long's "plain view" search of petitioner's car was not challenged in the Florida Supreme Court.

The results of Detective Long's "plain view" search were a little sand on the floor board, which could have come from anywhere in a seashore city, as Detective Long admitted at the evidentiary hearing. (R.519.) Of the two "suspicious" stains, one turned out to be from Coca-Cola. (R.521.) Detective Long also stated that he could not tell what the nature of the stains was "from outside the vehicle." (R.521.) Detedtive Long also stated on cross-examination that other than the sand and the stains, he "couldn't ascertain whether or not it was a crime scene with the naked eye." (R.521.) Yet these observations formed part of the affidavit used to obtain the first search warrant for the car (R.107-111), other than the information about petitioner himself which was shown to be insufficient above. The second search warrant was obtained on the basis of the blood sample obtained as the result of the first illegal search without probable cause.

Lacking probable cause to arrest petitioner and lacking probable cause to seize his automobile, the Florida Supreme Court is left with the argument that somehow an exigent circumstance existing because petitioner could have removed the car and destroyed the evidence. However, the only evidence that the officers had reasonable grounds to believe existed were some sand and two stains, none of which were considered by Detective Long to have indicated that the car was the scene of a crime.

The decision of the Florida Supreme Court to uphold as reasonable the seizure by the police of petitioner's car, when he himself was being illegally detained, reveals a court straining to justify searches because of the results produced rather than protecting important Fourth Amendment rights to be secure in property and person.

CONCLUSION

For all the reasons stated above, petitioner respectfully requests that this Court grant a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

James C. McKay Jr.

JAMES C. McKAY
Counsel of Record
JOHN H. MORE
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner

Appendix A

Supreme Court of Florida

No. 59,763

ROBERT BRIAN WATERHOUSE, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[February 17, 1983]

PER CURIAM.

This case is an appeal from a judgment of conviction of murder in the first degree. The trial court sentenced appellant to death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant Robert Brian Waterhouse was tried before a jury and found guilty of the murder of Deborah Kammerer, which occurred in St. Petersburg on the night of January 2, 1980. A separate sentencing hearing was held, after which the jury recommended that appellant be sentenced to death. Appellant now challenges the legality of several items of evidence used against him and questions the propriety of the sentence of death on several grounds. We affirm the conviction and the sentence of death.

On the morning of January 3, 1980, the St. Petersburg police responded to the call of a citizen who had discovered the dead body of a woman lying face down in the mud flats at low tide on the shore of Tampa Bay. An examination of the body revealed severe lacerations on the head and bruises around the throat. Examination of the body also revealed--and this fact is recited

not for its sensationalism but because it became relevant in the course of the police investigation--that a blood-soaked tampon had been stuffed in the victim's mouth. The victim's wounds were such that they were probably made with a hard instrument such as a steel tire changing tool. Examination of the body also revealed lacerations of the rectum. The cause of death was determined to have been drowning, and there was evidence to indicate that the body had been dragged from a grassy area on the shore into the water at high tide. The body when discovered was completely unclothed. Several items of clothing were gathered from along the shore at the scene.

The body showed evidence of thirty lacerations and thirty-six bruises. Hemorrhaging indicated the victim was alive, and defense wounds indicated she was conscious, at the time these lacerations and bruises were inflicted. Acid phosphotase was found in the victim's rectum in sufficient amount to strongly indicate the presence of semen there. Also, the lacerations in this area indicated that the victim had been battered by the insertion of a large object. The medical examiner was also able to determine that at the time of the murder the victim was having her menstrual period.

After several days of investigation the police were unable to identify the victim, so they announced the situation to the public. They then received an anonymous telephone call simply informing them of appellant's automobile tag number and advising them to investigate it.

The police also learned the identity of the victim from two of her neighbors. These two acquaintances, Yonan Wenz and Carol Byers, testified at trial that they went to the ABC lounge with the victim on Wednesday night, January 2, 1980. They testified that they later left the lounge and that Ms. Kammerer remained there at that time. Kyoe Ginn, who was working there as a bartender that night, testified that the victim came into the bar with a man and a woman, that they later left, that Ms. Kammerer then began talking with appellant who was known to the

witness) and that at about 1:00 a.m. appellant and Kammerer left the bar together.

On the evening of January 7, 1980, police officers asked appellant to voluntarily go with them to police headquarters for an interview. At this time he said that he did not know any girl named Debbie and that he went to the ABC lounge on January 1 but did not leave with a woman. After this interview appellant was allowed to leave but his car was impounded for searching pursuant to warrant. The automobile was searched on January 8 and appellant was arrested on January 9.

Detectives Murry and Hitchcox arrested appellant. In the car on the way to the police station, after advising appellant of his rights, Hitchcox asked him, "We were right the other night, weren't we, when we talked to you about being involved in this case?" Appellant responded simply, "Right." Shown a picture of Deborah Kammerer, appellant this time admitted that he did in fact know her.

On the afternoon of January 9, the detectives again interviewed appellant. Detective Murry testified concerning this interview. She said that appellant became emotionally upset and said repeatedly that his life was over, that he was going to the electric chair. He said that he wanted to talk to his interviewers as people and not as police officers. He then said that he had some personal problems with alcohol, sex, and violence.

The two detectives interrogated appellant again on January 10. Again appellant said he wanted to talk to them as people rather than as police officers. Detective Murry testified that appellant again indicated that he experienced a problem involving sexual activity. He said that when he drinks a lot, it is like something snaps and he then finds himself doing things that he knows are terrible and bad, and that he cannot control his behavior on such occasions. Appellant also told the officers that when he wanted to engage in sexual activity with a woman but learned that she was having her menstrual period, he would become

frustrated and angry and that this is what had happened the previous Wednesday night. He also said that he had had a lot to drink on Wednesday night.

Inspection of the interior of appellant's car revealed the presence of visible blood stains, and a luminol test revealed that a large quantity of blood had been in the car but had been wiped up. Analysis of the blood in the car and comparison with known blood samples of appellant and the victim revealed that the blood in appellant's car could have come from the victim but was not appellant's blood.

A forensic blood analyst testified that it is possible through analysis of blood stains on certain surfaces to make estimates concerning the direction and velocity of motion of the blood making the stains. This witness concluded from her analysis that the blood in appellant's car was deposited in the course of a violent attack.

A forensic hair analyst testified that hairs found in appellant's car were consistent in their characteristics with known hair samples from the victim.

A forensic fiber analyst testified that fibers found in the debris adhering to the victim's coat were similar to fibers from the fabric of the seat cover in appellant's car. Also, fibers were found in the car that had the same characteristics as fibers from the victim's coat and pants.

Appellant was employed as a plaster and drywall worker. His foreman testified at trial that on the morning of January 3, appellant arrived at work asking for the day off. He appeared to have a hangover and said he was feeling rough. The witness said that at this time appellant had scratches on his face. The witness also said that appellant had told him that he liked anal intercourse and liked being with women who allowed themselves to be hit and slapped.

On this appeal, appellant contends (1) that the trial court erred in denying his motion to suppress the statements he made during his first interview, on January 7; (2) that the trial

court erred in denying his motion to suppress the tangible evidence obtained from inside his car; (3) that the trial court erred in denying his motion to suppress the statements he made after his arrest, on January 9 and 10; (4) that the trial court erred in denying his motions to exclude evidence of collateral unlawful activity; (5) that the trial court erred in giving improper double consideration to a single aggravating factor in imposing the sentence of death; (6) that the trial court erred in considering the aggravating circumstance that the capital felony was committed in the course of a felony since the felony was an essential element of proof of felony murder; (7) that the trial court erred in finding the capital felony was especially heinous, atrocious, or cruel; and (8) that the trial court erred in finding that the murder was committed for the purpose of avoiding arrest. On several of the above points, appellant argues two or more grounds.

Prior to trial, appellant moved to suppress his statement of January 7. Appellant asserted that the initial stop of his car was an illegal arrest and that he was forced to accompany the officers to the police station. At the hearing on the motion, however, the state presented the testimony of officers who said that appellant was not arrested at this time and that he accompanied them voluntarily. Moreover, we conclude that when appellant was first stopped and was asked to go in for questioning, the investigators had reason to believe that appellant and his car had some connection with the murder. Therefore appellant's contention of error in admitting testimony of the January 7 statement is without merit.

Appellant argues that his car was seized without probable cause. After appellant's initial interview was concluded, he was allowed to leave the police station; he was not under arrest at that time. However, he was not allowed to take his car, which he had parked on the street across from the police station. Later that night, a warrant for the search of the car was issued and the next day it was searched. Since appellant was not allowed to

remove his car from where he had parked it, it is indisputable that the car was seized by the state without a warrant. It does not follow, however, that the subsequent search pursuant to a warrant was illegal. There was probable cause for the search, as is evidenced by the issuance of the warrant. There was also the exigent circumstance that the car was on the street and the appellant could have removed it and destroyed the evidence. Therefore, the seizure of appellant's car pending issuance of the warrant for its search was proper, based on probable cause and exigent circumstances. Carroll v. United States, 267 U.S. 132 (1925).

Appellant contends that his statements of January 9 and 10 should have been suppressed because the police violated his right to remain silent by questioning him after he had demonstrated a desire to consult an attorney. In the pretrial proceedings on the motion there was testimony concerning the two interrogation sessions. On January 9 after making certain statements in the car on the way to the station appellant said, "I think I want to talk to an attorney before I say anything else." At this point the officers ceased questioning him. Then, when appellant was being processed into the jail on the charge of murder, Detective Murry asked appellant whether he would like her to come to his cell, talk to him, and answer any questions he might have. He seemed interested, so detectives Murry and Hitchcox went to talk to him at 2:00 a.m. At this point appellant became emotionally upset and made certain statements described previously. The conversation ended when appellant said, "I think I'd like to talk to my attorney. Would you all come back tomorrow?" Then on the following day there was further interrogation eliciting statements entered into evidence.

Appellant also argues that officers violated the fifth amendment by questioning him after he had invoked his right to consult an attorney. He cites Edwards v. Arizona, 451 U.S. 477 (1981), which held that once an accused expresses a desire to deal with the authorities only through counsel, this desire must

be scrupulously honored and the accused is not subject to further interrogation until counsel has been made available, unless the accused himself initiates further communication. Edwards does not apply here because appellant did not express a desire to deal with the police only through counsel. His statements that he thought he should talk to an attorney were at most equivocal requests to consult with counsel. The officers were not prohibited from initiating further communication for the purpose of clarifying appellant's request. Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); Nash v. Estelle, 597 F.2d 513 (5th Cir.), cert. denied, 444 U.S. 981 (1979). Unlike in Edwards, appellant never explicitly stated that he did not want to talk to the police nor was he ever told that he was required to. Therefore the police did not act improperly in visiting appellant and questioning him further after his two equivocal statements expressing possible interest in seeing an attorney.

Appellant argues that the court erred in denying his motion to suppress the statements he made to detectives Murry and Hitchcox on the afternoon of January 10. That morning, appellant was taken to court for his first judicial appearance. At this time the public defender was appointed to represent appellant. Appellant argues that the officers should have notified his attorney before proceeding with the interview. There is no per se rule, however, requiring officers to notify the defendant's counsel before communicating with the accused and we decline to adopt such a rule now. The fact that an accused is represented by counsel does not preclude his waiver of the right to have counsel present when talking to law enforcement officers. Witt v. State, 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935 (1977). Here the appellant had invited the officers to return, was warned of his rights, and knowingly waived his right to have counsel present.

Appellant also argues that his statements should have been suppressed on the ground that they were not made voluntarily but were the product of actual coercion. We find this argument to be

completely without merit.

Appellant contends that the trial court should have prohibited any reference to some bags of marijuana that were found by the officers who searched and collected evidence from appellant's car. This testimony constituted evidence tending to show criminality separate from and unrelated to the crime charged in the indictment. The evidence was not relevant to any issue of material fact, and therefore should have been held inadmissible. See Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959). The error, however, was harmless. The Williams rule is calculated to prevent the unfairness of convicting the accused on the basis of evidence showing him to have bad character or a propensity to commit crimes such as the one charged. "Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty." Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925). The admission of irrelevant evidence tending to show commission of a dissimilar or much less serious crime, on the other hand, may be harmless error. See Coppolino v. State, 223 So.2d 68 (Fla. 2d DCA), appeal dismissed, 234 So.2d 120 (Fla. 1969), cert. denied, 399 U.S. 927 (1970). Appellant has failed to show how the testimony about the marijuana could have improperly prejudiced the jury against him. We therefore find the error to have been harmless. See State v. Wadsworth, 210 So.2d 4 (Fla. 1968).

Appellant also contends that the trial court erred in allowing the testimony of a cellmate who described an incident after appellant's arrest in which he either committed sexual battery upon another inmate or attempted to do so. Again appellant argues that the testimony was not relevant to any issue of material fact. We find, however, that the testimony was relevant because it included, and explained the context of, an incriminating admission made by appellant. The witness testified

that he did not actually see what transpired between appellant and the other prisoner because the witness and the remaining prisoners were ordered from the room by appellant, who had armed himself with a sharpened spoon. However, the witness said he saw appellant a short time afterward and that appellant, who appeared angry and dishevled, said, 'I wonder how he'd like a Coke bottle up his ass like I gave her.' The relevance of this admission lies in its connection to the medical examiner's testimony that the victim's rectal lacerations were consistent with the insertion of an object such as a Coke bottle. The statement was therefore relevant and the testimony was admissible to provide the contart in which the statement was made. The ruling was not error.

We come now to consideration of the sentencing proceeding and the sentence of death. As aggravating circumstances, the trial court found: (1) that appellant had previously been convicted of second-degree murder in the State of New York, a felony involving violence; (2) that at the time of the murder of Deborah Kammerer, appellant was on parole from the sentence imposed upon him for the New York murder (and was therefore under sentence of imprisonment); (3) that the murder of Deborah Kammerer was committed in the course of committing sexual battery; (4) that the murder of Deborah Kammerer was committed for the purpose of avoiding arrest by eliminating her as a witness to the crime of sexual battery; and (5) that the murder was especially heinous, atrocious, and cruel.

Appellant argues that the trial court gave improper double consideration to a single circumstance by reciting both that appellant had previously been convicted of a violent felony and that he was on parole, citing Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). The principle of Provence, however, is not applicable here. In Provence we reasoned that proof that a capital felony was committed during the course of a robbery necessarily was based on the same aspect of the crime that provided the basis for finding the motive of

pecuniary gain. The same reasoning does not apply to the two aggravating circumstances in question here. The previous conviction and the parole status were two separate and distinct characteristics of the defendant, not based on the same evidence and the same essential facts. Therefore separate findings of the two factors were proper.

Appellant argues that it was improper for the court to find that the capital felony was committed in the course of the violent felony of sexual battery since the commission of the sexual battery was an essential element of proof of murder under the felony murder theory. This argument is without merit. White v. State, 403 So.2d 331, 335-36 (Fla. 1981).

Appellant argues that the trial court's finding that the crime was especially heinous, atrocious, or cruel was erroneous. The clearly established facts of the murder show that this contention is without merit. The victim suffered numerous bruises and lacerations inflicted with a hard, sharp weapon. There were defense wounds showing that she was alive and conscious when she was attacked. The victim was left in the water where she drowned. The capital felony was especially heinous, atrocious, or cruel. See State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Appellant argues that there was insufficient proof that the murder was committed for the purpose of avoiding arrest. In support of this finding the state refers us to a statement appellant made to his interrogators when they asked him what he thought he should do about his "problem." He said, "You do what you have to do to protect Bobby Waterhouse. No one wants to go to jail." It is questionable whether this statement supports the inference drawn by the state. Appellant's statements also included suggestions that the murder was committed in a spur-of-the-moment rage. We need not decide, however, whether the lone statement is sufficient to prove a witness-elimination motive, since even without this aggravating circumstance there are numerous other aggravating circumstances to support the

sentence, and no mitigating circumstances.

Appellant's contentions of error in the judgment are all without merit. The judgment is affirmed. We conclude that under the proven facts of the case, a sentence of death is appropriate. Therefore the sentence of death is also affirmed.

It is so ordered.

ALDERMAN, C.J., ATKINS, BOYD, OVERTON and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Pinellas County,

Robert E. Beach, Judge - Case No. 80-1925

Philip J. Padovano, Tallahassee, Florida,

for Appellant

Jim Smith, Attorney General and Peggy A. Quince, Assistant Attorney General, Tampa, Florida,

for Appellee

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

Appendix B

CASE NO. CRC8000192CFAS0

STATE OF FLORIDA

VS

~~ROBERT BRIAN WATERHOUSE 50456~~

The following was done in open court this 22nd day of AUGUST, 1980.

AFTER HEARING SWORN TESTIMONY AND ARGUMENT OF COUNSEL, DEFENDANT'S MOTION TO SUPPRESS NUMBER I AND II IS HEREBY DENIED. NUMBER III GRANTED AS TO STATEMENTS MADE JANUARY 10, 1980 AND DENIED AS TO THE BALANCE OF SAID MOTION.

FILED
AUG 29 1980
HAROLD MULLENDORE
CLERK CIRCUIT COURT
Deputy Clerk

Dated this 22nd day of AUGUST, 19 80, in ST PETERSBURG Florida.

CIRCUIT JUDGE

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

CASE NO. CRC8000192CFAS0

STATE OF FLORIDA

VS

ROBERT BRIAN WATERHOUSE

50456

The following was done in open court this 25th day of AUGUST, 19 80.

AFTER ARGUMENTS OF COUNSEL, IT IS CONSIDERED AND ORDERED THAT THE STATES RE-HEARING OF MOTION TO SUPPRESS PREVIOUSLY HAVING BEEN GRANTED ON AUGUST 22, 1980. THE COURT HEREBY VACATES AND SETS ASIDE PREVIOUS RULING ON MOTION TO SUPPRESS OF AUGUST 22, 1980 AND THE MOTION IS DENIED AT THIS TIME.

FILED
AUG 26 1980
HAROLD MULLENDORE
CLERK CIRCUIT COURT
Deputy Clerk

E. N.

Dated this 25th day of AUGUST, 19 80, in ST PETERSBURG, Florida.

CIRCUIT JUDGE

CIRCUIT COURT, PINELLAS COUNTY, FLORIDA

CASE NO. CRC 80 00192 CFASO CT. CR.

FILED
SEP - 3 1980
HAROLD MULLENDORE
CLK. CIRCUIT COURT

STATE OF FLORIDA

vs.

ROBERT BRIAN WATERHOUSE 00050456

JUDGMENT AND SENTENCE - CAPITAL CASE - DEATH PENALTY

You, the defendant herein, being present in person and with counsel, PAUL SCHERER and JOHN THOR WHITE, having been duly and regularly tried by a petit jury of twelve people for the crime of MURDER IN THE FIRST DEGREE as charged in the Indictment. And you being now attended by your counsel in open court, and having been called upon to say why sentence should not be pronounced upon you, and you having said nothing which would bar or preclude such sentence, it is, therefore,

THE SENTENCE OF THE LAW AND THE JUDGMENT AND ORDER OF THIS COURT, that you, for the crime of MURDER IN THE FIRST DEGREE, for which you now stand convicted, shall be taken by the Sheriff of the County of Pinellas to the common jail of said County or the State Prison in the State of Florida and there securely kept until such time as the Governor of the State of Florida shall in and by his Warrant fix and appoint, at which time you shall be delivered by the Sheriff of said County to the Superintendent of the State Prison of the State of Florida, at the place of execution named in the Governor's Warrant as soon as may be after receipt by the Sheriff of the said County of the Death Warrant for you from the Governor of said State, at which time and place in said Warrant fixed and named, and within the walls of the permanent death chamber provided by law, you shall be, by the proper execution officer of the State Prison, electrocuted until you are dead. And may God have mercy on your soul.

Thereupon the defendant was remanded to the custody of the Sheriff.

Judge of the Circuit Court

Left four fingers	Left Thumb	Right Thumb	Right four fingers
			

Impressions made by: R. R. Ballard
Deputy Sheriff

I hereby certify that the above and foregoing fingerprints on this Judgment are the fingerprints of the defendant, ROBERT BRIAN WATERHOUSE, and that they were placed thereon by said defendant in my presence, in open court, this the 3rd day of September, 19 80.

Judge of the Circuit Court

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION
CIRCUIT CRIMINAL NO. 80-192

STATE OF FLORIDA)
)
VS.) MURDER IN THE FIRST DEGREE
)
ROBERT BRIAN WATERHOUSE 50456)

FILED
SEP 15 1980
HAROLD MULLENDORE
CLERK CIRCUIT COURT
E. H. Costello Deputy Clerk

ORDER

THIS CAUSE came on to be heard on the sentencing of Defendant, ROBERT BRIAN WATERHOUSE, following the conviction of Murder in the First Degree and an advisory verdict recommending the death penalty by a jury of twelve of his peers and the Court having heard the case in chief and considered the mitigating and aggravating circumstances, makes the following Findings of Facts and Orders:

AGGRAVATING CIRCUMSTANCES

A. The Defendant, ROBERT BRIAN WATERHOUSE, was previously convicted in New York of the felony of Murder in the Second Degree. The Defendant was sentenced to twenty (20) years to life for the commission of that crime but was paroled after serving approximately eight (8) years in the New York prison system. At the time of the commission of the present homicide, ROBERT BRIAN WATERHOUSE was on lifetime parole from New York.

B. At the time of the commission of the present homicide, ROBERT BRIAN WATERHOUSE was previously convicted of the said New York felony involving the use or threat of violence to the victim of the said New York homicide.

C. The Murder in the present case was committed by ROBERT BRIAN WATERHOUSE while ROBERT BRIAN WATERHOUSE was engaged in the commission of a Rape, also known as an Involuntary Sexual Battery, a life felony, upon the victim.

D. The Murder in the present case was committed for the purpose of avoiding or preventing a lawful arrest in that the victim in the instant case was killed in order to eliminate her as a witness

E. The Murder was committed by ROBERT BRIAN WATERHOUSE in an extremely wicked, outrageous, shocking, evil, and vile manner, and in a way designed to inflict a high degree of pain upon the victim with utter indifference to the suffering of the victim, and, therefore, was especially heinous, atrocious, and cruel.

MITIGATING CIRCUMSTANCES

A. None.

THEREFORE, it is the order of this Court that the Defendant, ROBERT BRIAN WATERHOUSE, be sentenced to death in the electric chair.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 12 day of September, 1980.

CIRCUIT JUDGE

Copies furnished to:

JACK HELINGER and ROBERT MERKLE, State Attorney's Office, 150 - Fifth Street North, St. Petersburg, Florida;

PAUL SCHERER and JOHN WHITE, Attorneys for the Defendant, 2901 - First Avenue North, St. Petersburg, Florida.

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 27, 1983

Appendix C

ROBERT BRIAN WATERHOUSE,	**	
Appellant,	**	CASE NO. 59,765
vs.	**	Circuit Court Case No. 80-1925 (Pinellas)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the petition for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, and OVERTON, JJ., Concur
McDONALD, J., Dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C
cc: Hon. Karleen F. DeBlaker, Clerk
Hon. Robert E. Beach, Chief Judge

Philip J. Padovano, Esquire
Mr. Robert Brian Waterhouse
Peggy Quince, Esquire

No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT BRIAN WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA: ss:

The undersigned, John H. More, being duly sworn, hereby deposes and states on his oath that on this 26th day of July, 1983, he has served one copy each of Petitioner's Petition for Writ of Certiorari to the Supreme Court of Florida and Motion to Proceed in Forma Pauperis with attachments, by first-class mail, postage prepaid, upon the Honorable Jim Smith, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32304.

All parties required to be served by me have been served.

John H. More

JOHN H. MORE
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Subscribed and sworn to before me this 26th day of July, 1983.

NOTARY PUBLIC

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT BRIAN WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Robert Brian Waterhouse, who is now held in the Florida State Prison at Starke, Florida, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. 28 U.S.C. § 1915(a); Adkins v. Du Pont Co., 335 U.S. 331 (1948).

Attached hereto are copies of an Affidavit of Insolvency, Orders of Insolvency, and Appointing Attorney filed for petitioner in the Circuit Court for Pinellas County, Florida. Attached also is a copy of an affidavit in the hands of petitioner who presently is incarcerated

in the State of Florida. I will file the affidavit when it has been executed and delivered to me. The firm of Covington & Burling has taken this case on a pro bono publico basis.

James C. McKay Jr.

JAMES C. McKAY
(Counsel)
JOHN H. MORE

Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner

July 26, 1983

COUNTY COURT, PINELLAS COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. CRC 80 00192 CFAS2

FILED

JAN 10 1980

HAROLD MULLENDORE
CLERK COUNTY COURT
James Pulse Deputy Clerk

STATE OF FLORIDA

VS.

Robert B. Waterhouse
50456

AFFIDAVIT OF INSOLVENCY

Affiant being first duly sworn on oath deposes and says that he is totally insolvent and utterly unable to pay the charges, costs or fees in this cause either in whole or in part; that he has no property or other means of payment either in his possession or under his control and that he has not divested himself of any property, either real or personal, for the purpose of receiving benefit from his oath; that he, at this time, is wholly without funds and unless this Court makes and enters an Order adjudging him, this defendant, insolvent, he will be deprived of his rights under the law in such cases made and provided. This affiant offers himself up to the Court for the purpose of further examination into his insolvency.

Affiant further says that he has been informed that a lien for the value of the services rendered him by the Public Defender, and/or his costs of defense may be impressed by law on any property he now has, or may hereafter have, in the State of Florida, and he hereby waives notice of any proceedings at which the value of the services of the Public Defender and/or costs of defense, as aforesaid, may be determined, and further waives any notice of the filing of the aforesaid lien.

(sign here) Robert B. Waterhouse

ORDER OF INSOLVENCY AND APPOINTMENT OF PUBLIC DEFENDER

The above named Defendant, being before the Court and the said Defendant having filed in this Court his Affidavit of Insolvency; and testimony having been taken before the Court; and the Court being otherwise fully advised in the premises, it is, thereupon

ORDERED AND ADJUDGED that the Defendant be, and he is hereby, declared to be insolvent within the meaning of Sec. 27.52 FLORIDA STATUTES; and it is further

ORDERED AND ADJUDGED that the Office of the Public Defender for the Sixth Judicial Circuit, in and for Pinellas County, Florida, is hereby appointed to represent said Defendant in the above styled cause.

IT IS FURTHER ORDERED that in the event the defendant, or his parents, is ordered to pay for the costs of the Public Defender's services, then the Public Defender shall, within 30 days of the final determination of this cause, submit a Motion to this Court to Establish the Value of the Services of the Public Defender. If the Court has also ordered the defendant to pay for the costs of defense, then the Public Defender shall, within 30 days of final determination of this cause, submit an Itemized Statement of Costs of Defense, such lists can be obtained from the Clerk's Office of the Board of County Commissioners.

DONE AND ORDERED this 10 day of JAN, A.D., 19 80 at St. Pete, Florida.

COUNTY JUDGE

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

CASE NO. CRC8000192CFASO

FILED

OCT 8 1980

SID J. WHITE
CLERK SUPREME COURT

By _____
Deputy Clerk

STATE OF FLORIDA

VS

ROBERT BRIAN WATERHOUSE

50456

The following was done in open court this 4th day of September, 19 80.

IT IS CONSIDERED AND ORDERED THAT THE COURT HEREBY APPOINTS ATTORNEY PHILLIP PADAVANO TO REPRESENT THE DEFENDANT IN THE ABOVE CAUSE FOR PURPOSES OF APPEAL.

STATE OF FLORIDA
COUNTY OF PINELLAS

This Copy is a true Copy of Original Order on file in this Office,
WITNESS, my hand and Official Seal, this 6th day of Oct. A. D., 1980
HAROLD MULLENDORE
Clerk of Circuit Court
By Dorothy J. Henderson
Deputy Clerk

FILED
SEP 10 1980
HAROLD MULLENDORE
CLERK CIRCUIT COURT
By _____ Deputy Clerk

Dated this 4th day of September, 19 80, in St. Petersburg, Florida.

Robert B. Beach
CIRCUIT JUDGE

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT BRIAN WATERHOUSE, Petitioner

v.

STATE OF FLORIDA, Respondent

AFFIDAVIT

I, Robert Brian Waterhouse, being first duly sworn according to law, depose and say, in support of any motion for leave to proceed without being required to prepay costs or fees: (1) I am the petitioner in the above-titled case. (2) Because of my poverty I am unable to pay the costs of my petition. (3) I am unable to give security for the same. (4) I believe that I am entitled to the redress I seek in said case. (5) The nature of the case is briefly stated as follows:

I was sentenced to death by the Circuit Court of Pinellas County, Florida, on a first degree murder charge. The present proceeding was commenced to reverse my conviction and sentence on constitutional grounds.

Robert Brian Waterhouse

Duly witnessed and sworn before me,
a Notary Public, this _____ day of
June, 1983.

Notary Public

No. A-1008

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT B. WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Florida

APPLICATION FOR EXTENSION OF TIME IN WHICH
TO FILE PETITION FOR WRIT OF CERTIORARI
AND PERMISSION TO FILE A SUBSTITUTE PETITION

To the Honorable Lewis F. Powell, Jr., Associate Justice of the United States and Circuit Justice for the Eleventh Circuit:

Petitioner Robert B. Waterhouse prays that an order be entered further extending the time for filing a petition for writ of certiorari to and including August 25, 1983. This application is being submitted together with a Petition for a Writ of Certiorari in order to preserve petitioner's constitutional issues. The reasons for this extraordinary request are set forth below at p. 3. The relevant dates for this application for extension are:

April 27, 1983: Petition for rehearing denied by the Supreme Court of Florida.

June 27, 1983 (June 26 is a Sunday): Expiration of time for filing petition for writ of certiorari in this Court, unless extended.

July 26, 1983: Expiration of requested 30-day extension of time for filing a petition in this Court.

July 26, 1983: Time for filing per Order Extending Time to File Petition for Writ of Certiorari, dated June 17, 1983, by Justice Lewis F. Powell, Jr.

No opinion was rendered by the Supreme Court of Florida in the course of denying the petition for rehearing. The pertinent nature of the petitioner's case is as follows:

1. Petitioner was sentenced to death in 1980 in the Circuit Court for Pinellas County, Florida, after a trial and sentencing hearing before a jury.

2. On February 17, 1983, the Supreme Court of Florida in a per curiam opinion affirmed the conviction of murder in the first degree and sentence of death, overruling Petitioner's constitutional contentions that (a) his statements should have been excluded from evidence on the grounds that (i) they were obtained as the result of an illegal arrest or detention, (ii) they were obtained after he had expressed his intention to remain silent, (iii) his final statement was obtained in an interview conducted without notice to his court-appointed attorney, and (iv) there was no showing that the statements were made voluntarily; (b) tangible evidence seized from his car should have been excluded on the grounds that the evidence was obtained as the result of an illegal arrest or detention and of a search made without probable cause or search warrant; (c) evidence

of Petitioner's alleged use of marijuana and an alleged homosexual rape attempt should have been excluded on grounds of lack of relevance; (d) the evidence was insufficient to support a finding that a capital felony had been committed by Petitioner for the purpose of avoiding or preventing a lawful arrest or a finding that the capital felony was particularly heinous, atrocious, and cruel; (e) the trial judge erred in basing two of the aggravating circumstances on a single prior act of Petitioner; and (f) involuntary sexual battery was an essential element of the homicide and, as such, could be used as an aggravating circumstance.

This Court's jurisdiction under 28 U.S.C. § 1257(3) will be invoked.

This extension of time and permission to substitute a final Petition is requested since (1) the undersigned were ordered by the petitioner, Robert B. Waterhouse, today by telephone not to file the Petition for a Writ of Certiorari, which accompanies this Application, on the grounds that he has not reviewed and approved the final version of the Petition to be filed; (2) petitioner wishes to have an extension of time to be able to review the final version before it is filed; (3) petitioner has refused to sign an affidavit for the Motion to Proceed in Forma Pauperis until he has reviewed the draft and approved its filing, (4) petitioner indicates that he will write the Supreme Court to have the Petition withdrawn if he does not receive the opportunity to review and approve; and (5) the gravity of the death penalty warrants the provision of sufficient extra time to enable petitioner to review the Petition and suggest any reasonable changes. Extension of the time for filing to

August 25, 1983, would provide enough time to accomplish the tasks mentioned above.

Since Petitioner continues to be incarcerated in the Florida State Prison, no prejudice to the State's concerns can result from an additional 30-day extension of time requested.

Wherefore, Petitioner respectfully requests an order extending the time for filing a petition for writ of certiorari to and including August 25, 1983.

Respectfully submitted,

James C. McKay jtm

James C. McKay
Counsel of Record
John H. More

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner

July 26, 1983

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 1983, copies of this application were mailed, postage prepaid, to the Attorney General of the State of Florida, Tallahassee, Florida. I further certify that all parties required to be served have been served.

Counsel for Petitioner